

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

**BIOSOURCE LANDSCAPING SERVICES, LLC <sup>1/</sup>**

**Employer**

**and**

**Case 9-RC-18086**

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 18, AFL-CIO**

**Petitioner**

**DECISION AND ORDER**

**I. INTRODUCTION**

The Employer, a landscaping contractor, with a facility in Xenia, Ohio, is engaged in the performance of commercial and residential landscaping services. In addition, the Employer manufactures and sells various landscaping products such as mulch, compost and topsoil at its 23-acre facility, which also serves as an EPA waste facility.

The Petitioner has filed a petition seeking to represent a craft unit consisting of employees who operate hydro seeders, skid steers (bobcats), bulldozers, excavators, grinders, and front end loaders employed by the Employer at or out of its Xenia, Ohio facility, excluding all laborers, truck drivers, all office clerical employees, professional employees, guards and supervisors as defined in the Act. The Petitioner has stated its unwillingness to proceed to an election in any other unit if I find the petitioned for craft unit inappropriate for the purposes of collective bargaining. The Employer, contrary to the Petitioner, asserts that the petitioned for craft unit is not appropriate but concedes in brief that an all employee unit might be appropriate. In addition, the Petitioner, contrary to the Employer, contends that the Employer is engaged in the construction industry and that application of the *Daniels* voting eligibility formula <sup>2/</sup> is therefore, appropriate. Finally, the Employer asserts that three of the six employees sought by the Petitioner are supervisors within the meaning of Section 2(11) of the Act. There is no history of collective bargaining affecting any of the employees sought to be represented. I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. For the reasons set forth in detail below, I find that the record does not support a finding that the Employer is engaged in the construction industry or that the employees sought by the Petitioner constitute a distinct and identifiable craft unit of heavy equipment operators. Accordingly, I find that the unit sought by the Petitioner does not

---

<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> *Daniels Construction Co.*, 133 NLRB 264 (1961).

constitute an appropriate bargaining unit and, because the Petitioner will not proceed to an election in any other unit, I will order that this petition be dismissed. <sup>3/</sup>

## II. FACTS

The Employer's co-owner and president is Jeanne Hellstrom. Hellstrom and two business partners, Mark and Theresa Lee, purchased the Employer from former owner Steve Combs in November 2005. <sup>4/</sup> As part of the sale agreement, Combs is obligated to remain with the Employer in a sales and estimating capacity for a period of 1 year. The Employer currently employs 14 employees.

The current employee complement includes two Commercial Landscape Foremen, Kelly Guthrie and Tim Muterspaw; a Residential Landscape Foreman, Justin Pemberton; and a Maintenance and Production Foreman, Dustin Miller. In addition, there are two employees on the hydro seeding crew, Donald Combs and Dave Dodson; a maintenance mechanic; two truck drivers; two full-time laborers and an office manager. Donald Combs and Dodson report to Muterspaw. As members of the hydro seeding crew, Combs and Dodson typically move from job-to-job and report to the foreman of the job to which they are assigned.

The office manager, George Kirby, is paid a salary but all other employees, including the foremen, are hourly paid. The commercial and residential landscape foremen are paid in a range of 10 to 25 percent more an hour than the Employer's other employees unless such employees are working on a prevailing wage job. On such jobs, the foremen as well as the other employees are paid prevailing wage for their particular classification. The foremen also have company trucks that they drive to and from the jobsite or to the Employer's facility. All other benefits for the foremen are the same as those accorded to the other employees. The Employer's business is seasonal in nature. As a result, the Employer typically lays off most of its workforce beginning in about November of each year and begins recalling employees in about March of the following year, but on July 17, it had an atypical layoff in mid-summer.

The Employer generates 40 percent of its revenue from on-site retail and wholesale sales of its landscape products, including topsoil, mulch, garden blends and gravel. Additional "on-site" revenue is generated by snow removal jobs and the spreading of bio-solids in a local farmer's fields. The remaining 60 percent of the Employer's revenue is generated through its commercial and residential landscaping projects, including hydro seeding. Of this 60 percent, less than half of the Employer's business, or less than 30 percent of its total business, is commercial landscaping work.

A variety of equipment is used by the Employer in its production operations. The Employer has two CAT loaders, one CAT rubber tired backhoe, one PC-150 Kumatsu track hoe,

---

<sup>3/</sup> Because of my conclusion that the unit sought by the Petitioner is not appropriate, I find it unnecessary to resolve the Employer's contention that three of the six "operators" initially sought by the Petitioner are statutory supervisors. Further because of my conclusion that the Employer is not engaged in the construction industry, it is unnecessary to determine whether the *Daniels* formula for voting eligibility is applicable.

<sup>4/</sup> All dates herein are in 2006 unless otherwise indicated.

four bobcats, and a dozer. It also has grinder production machines, a topsoil processor, and a trammel screen. It also uses dump trucks to deliver the landscaping products to jobsites and customers.

The Employer's employees, who work primarily at its facility, are all involved in the production process to some degree. Thus, Maintenance and Production Foreman Miller spends 20 to 40 percent of his work time performing maintenance related tasks. The remainder of his work time is spent in production and related tasks. These tasks include operating equipment at the Employer's facility in connection with filling and loading customer orders for landscaping products. Production related tasks take up as much as 80 percent of Miller's work time during the Employer's busier periods of the year. Darrel Hohn works under Miller and spends about 20 percent of his work time performing mechanic related maintenance and repair work on the Employer's equipment. Similar to Miller, the remaining 80 percent of his work time is spent performing production biosystem, work and operating equipment, such as loaders, the track hoe, the dozer, and the grinding machinery.

It is noted that Matt Liming, one of the employees the Petitioner originally sought to include in the unit as an operator, prior to being laid off on about July 17, was employed primarily as a mechanic in the shop or as a driver delivering landscape products to customers. He only operated equipment once or twice a week in the performance of loading duties for customers. Indeed, one witness characterized Liming's mechanic duties as comprising 98 percent of his work time.<sup>5/</sup>

Office Manager Kirby works out of the Employer's facility and typically works 8-8 ½ hours a day Monday through Friday from about 7:30 a.m. to 4:30 p.m. He also works from about 8 a.m. to 12 noon on Saturdays. Kirby performs some traditional office functions, including answering the Employer's telephone, returning calls when voice messages are left and sending and receiving facsimile transmissions. However, about 6 hours of every shift are spent loading customers' vehicles, talking to customers, receiving payments for purchased product, printing and distributing tickets for product deliveries, measuring out product, quoting product prices, and some laborer work on site, including hand shoveling and splitting firewood. According to the record, Kirby spends between 60 and 75 percent of his time operating equipment at the facility, loading the Employer's trucks, and loading trucks and vehicles for retail customers and contractors. In performing this work he uses a bobcat, loader and backhoe, which is the same equipment operated by the employees the Petitioner would include in the unit.

Steve Combs spends about 30 to 40 percent of his work time engaged in sales and estimating tasks and 25 percent of his work time at the facility loading trucks with landscaping products. In this task he uses a bobcat, backhoe and loader. The remainder of his work time is spent in production and performing related tasks, in which he utilizes the Employer's equipment. Like Kirby and those employees the Petitioner would include in the unit, Combs uses a bobcat, loader, and backhoe to perform these tasks. Combs is regularly scheduled from 6:30 a.m. to 5 p.m. Monday through Friday. However, he also regularly works on Sundays at the facility, during which time he uses a loader in the composting process.

---

<sup>5/</sup> In brief the Petitioner altered its position, contending that Liming does not show a community of interest with the Petitioner for unit and should not be eligible to vote.

The primary piece of equipment used on landscaping projects is the bobcat, which has multiple attachments for different purposes such as rock removal and planting trees. In this regard, Commercial Landscape Foremen Guthrie and Muterspaw spend 85 to 95 percent of their work time operating a bobcat. It appears that their other work time is spent operating a straw blower. Residential Landscape Foreman Pemberton currently spends about 25 percent of his time on residential landscaping jobs and 75 percent on commercial landscaping jobs. He operates a bobcat about 10 percent of his time in connection with his work on residential projects and has been trained to use two bobcat attachments. He also has been trained to operate the straw blower. He was hired by Hellstrom in April and most of his time on commercial landscape projects, to this point, has been as a laborer.

Hellstrom assigns employees to work on the Employer's different jobs on a daily basis. In making these assignments, she endeavors to keep the same personnel together from job-to-job when possible. Hellstrom visits the commercial and residential landscaping jobsites on an occasional basis. Typically, a foreman is in charge of each jobsite and, when the Employer is a subcontractor on a job, interacts with the representative of the general contractor or government entity for which the work is being performed.

The Employer has a variety of commercial landscaping customers. Many of these customers and the jobs that the Employer performs for them are not related to construction work. Some of the Employer's commercial jobs include hydro seeding, plant installation, grading and rock hounding (removal of large rocks). Bobcats are the primary equipment used in the Employer's commercial landscaping work. They are used to rock hound and, using an auger attachment, to dig holes for planting trees. Commercial customers of the Employer include landfill companies and gravel pits for which the Employer performs hydro seeding. The Employer also performs landscaping subcontracting work in connection with street improvements. This type of work typically is performed in cities such as Tipp City, Fairborn, Xenia, and Butler Township. The Employer performed only one highway subcontracting job in the past year. It also laid sod and planted trees and bushes at the University of Dayton.

The Employer rarely uses all of its equipment off site but will occasionally use the loader to haul sand out of a Xenia foundry. A small tractor is also used off site on occasion to mow grass and rake straw. On rare occasions other equipment may be used off site. For example, the bulldozer was used at the local water treatment plant and the track hoe, dozer and loader, in the past, were used by the predecessor employer to build ponds. The Employer on occasion has used the track hoe to perform demolition work on houses but has performed only one such demolition job in the past year.

### III. ANALYSIS

The Board has long held that "in the construction industry units may be appropriate on the basis of a craft, or because they comprise a clearly identifiable and functionally distinct group of employees..." *The Longcrier Company*, 277 NLRB 570, 572 (1985). Generally, where there is no bargaining history on a more comprehensive basis, a craft or traditional departmental group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is an appropriate unit. See, e.g., *E.I. DuPont & Co.*, 162 NLRB 413 (1966); see also, *Mirage Casino-Hotel*, 338 NLRB 529 (2002). The Board described a craft unit as, "one consisting of a distinct and homogenous group of skilled journeymen craftsmen who, together

with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment.” *Burns and Roe Services Corporation*, 313 NLRB 1307, 1308 (1994); citing, *Phoenician*, 308 NLRB 826 (1992). Thus, in determining whether a petitioned-for group of employees constitutes a separate craft unit, “the Board examines whether the petitioned-for employees participate in formal training or an apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; whether the Employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.” *Burns and Roe*, supra at 1308 (citation omitted); see also, *Metropolitan Opera Association, Inc.*, 327 NLRB 740, 754 (1999); *Schaus Roofing and Mechanical Contractors, Inc.*, 322 NLRB 781, 783 (1997).

I turn first to a brief examination of whether the Employer is engaged in the construction industry. Initially, the record discloses that the Employer derives much of its revenue from on-site sales of landscaping product. Additional revenue is garnered from the performance of residential and commercial landscaping work that, for the most part, is not connected to construction work. Thus, hydro seeding landfills and gravel pits, snow removal, and performing landscaping work on existing residences and commercial entities, does not appear to constitute “construction” work as been defined by the Board and courts. See, e.g., *F.H.E. Services, Inc.*, 338 NLRB 1095 (2003); *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 953-954 (1966). The Employer’s work on city streets and highways as a landscape subcontractor more nearly qualifies as construction work as the term of art has come to be defined in determining the applicability of Section 8(e) and (f) of the Act. Although imprecise, the record indicates that this type of work constitutes only a small percentage of the work performed, and revenue generated, by the Employer. Accordingly, I find that the record is, at best, inconclusive as to whether the Employer is engaged in the construction industry. Indeed, on the record before me, I do not find the Employer to be primarily engaged in the construction industry for purposes of determining the appropriateness of the craft unit sought by the Petitioner.

I note that a determination that the Employer is not engaged in the construction industry is not necessarily fatal to the Petitioner’s craft unit contention. However, as noted above, the Board has recognized that units limited to homogenous groups of employees may be appropriate in the construction industry if they constitute a craft or other clearly identifiable and functionally distinct group of employees. *Longcrier*, supra at 572. Accordingly, I have considered the Petitioner’s construction industry contention. Here, as in *Longcrier*, the employees sought by the Petitioner do not meet either of the above noted tests to conclude that they constitute a craft unit. Id.

In *Longcrier*, the petitioner sought to represent a unit of equipment operators. The Board found that the requested unit was inappropriate in part because of the “overlapping duties and functional integration of the work performed by the petitioned-for employees with that of the remaining employees.” *Longcrier*, supra at 572. Additionally, it was noted that the employer in *Longcrier* utilized employees, like the Employer here, to operate equipment according to need rather than following strict job classifications. Id. The record in *Longcrier* also established that the petitioned-for employees, like those sought by the Petitioner, performed, other tasks, worked with other employees as an integrated team, and had not participated in or completed any type of

formal apprenticeship program. Id. *Longcrier* differs from the subject case in that there, "the requested unit would include those employees who happen to spend a majority of their time operating some type of construction equipment." Id. The record here presents a more compelling case for rejecting the Petitioner's contention that a craft unit is appropriate. Here, the record shows that the Petitioner would include some employees who spend a majority of their work time operating equipment, however, it would exclude others who likewise spend a majority of their work time operating the same type of equipment.

Although Commercial Landscape Foremen Muterspaw and Guthrie spend the great majority of their work time operating a bobcat, most of the Employer's other employees perform a wide range of duties. For example, the Employer's truck drivers perform laborer work and Foreman Pemberton also frequently performs laborer work. Similarly, the Employer's on-site employees perform a range of tasks including, mechanic's duties, loading of product, biosystem production work, and sales and office related tasks. In this regard, the record discloses that employees Combs, Miller, Hohn and Kirby, all spend the majority of their respective work days operating some type of equipment, whether it be a bobcat, dozer, loader, track hoe or back hoe.

Here, similar to *Longcrier*, the operators who work away from the Employer's facility work with other employees as an integrated team. Thus, laborers and truck drivers work with bobcat operators on various projects, as do the hydro seed crew, who go from project to project during the course of a single work day. As in *Longcrier*, the operators of the equipment here do not undergo any type of formal training or apprenticeship program. Rather, their roles for the Employer have evolved out of their long experience in operating bobcats and the other equipment utilized by the Employer. The work performed by the Employer's employees, as a whole, is dictated by need and does not follow strict job classifications. See *Longcrier*, supra. Although, I note that, Guthrie and Muterspaw, as well as possibly Brown and Donald Combs, spend the majority of their work time operating equipment, there was no testimony that their work time consists exclusively of operating such equipment. Indeed, at least some of their work time is spent in the performance of tasks performed by the Employer's other employees, many of whom also regularly operate equipment.

#### IV. CONCLUSION

In sum, the unit sought by the Petitioner is simply not a distinct and homogenous group of employees or skilled craftsmen that might be characterized as a craft unit or other clearly identifiable and functionally distinct group.

For all these reasons, I find that the craft unit sought by the Petitioner is not an appropriate unit for purposes of collective bargaining. Because the Petitioner declines to proceed to an election in any other unit, I need not address the issue of what unit would be appropriate and I will dismiss the petition.

Based on the foregoing and the entire record, I make the following findings:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will

effectuate the purposes of the Act to asset jurisdiction.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The labor organization involved claims to represent certain employees of the Employer.

5. A question affecting commerce does not exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

#### **V. ORDER**


Accordingly, having duly considered the matter,

**IT IS HEREBY ORDERED** that the petition be, and it hereby is dismissed.

#### **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by September 1, 2006.

Dated at Cincinnati, Ohio this 18<sup>th</sup> day of August 2006.

  
\_\_\_\_\_  
Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

Classification Index:

440-1760-3420-8000

440-1760-9133-1000